Extradition: A Fair and Effective Weapon in the War on Terrorism

I. INTRODUCTION

Skeptics of the United States invasion of Panama were appalled at the lengths to which the United States government went to secure the arrest of an individual, commonly viewed as the most internationally-prolific "terrorist" in the world today.[1] Although there exists wide-spread support for the abduction and prosecution of terrorists, an underlying clamor arose from disapproving nations, signalling that the United States had gone too far in Panama. Allegations of senseless aggression and sheer bullying ran rampant with skeptics of the military maneuvers pleading for a less subversive attack on terrorism. In light of the relentless drug infiltration into our borders, frequent hijackings over the high seas and the random bombing of innocent civilians abroad, though, is such a limited "war on terrorism"[2] plausible? Proponents of the military escalations in Panama believe it is not.

Fortunately for those skeptical of the appropriateness of the invasion, the United States Constitution prevents such an unlimited assault. An appropriate factual microcosm to the roadblocks facing the abduction, prosecution and extradition[3] of terrorists may be found in a recent New York district court case. In *Ahmad v. Wigen*,[4] the accused had allegedly firebombed a passenger bus in Israel before eventually finding refuge in Venezuela.[5] Although Israel had no extradition treaty with Venezuela, the United States, which had such a treaty, intervened and circumvented the process by seizing Ahmad, the accused, on a commercial airliner bound for the United States and brought him to the U.S. to face extradition proceedings.[6] Two important issues arise when the U.S. intervenes as such a middleman: (1) What limits are placed on the U.S. in the "abduction" of the alleged terrorist; and (2) what limits are imposed upon the U.S. in the terrorist's subsequent "extradition?"

Much has been written about the rights of the accused during the abduction phase.[7] Controversy has surrounded the *Ker-Frisbie*[8] doctrine's liberal al-

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1. 24,000 U.S. troops were dispatched to Panama in order to capture Manuel Noriega and bring the alleged ally of South American druglords to justice. Manegold, *A Standoff in Panama*, NEWSWEEK, Jan. 8, 1990, at 28. For a more thorough analysis of the invasion of Panama, see Nanda, Farer D'Amato and Agora, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?: The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 503, 516 (1990).

2. Like his predecessor, President Bush has frequently pledged to continue to wage "war on terrorism." *See, e.g.*, Krieger, *Pan Am 103: Still a Disgrace*, Wash. Times, Dec. 26, 1989, at D2 (Bush has called for a "total war" on terrorism).

3. Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 474 at 556-57 (1987).

4. 726 F. Supp. 389 (E.D.N.Y. 1989), *aff'd* 910 F.2d 1063 (2d Cir. 1990), *stay denied*, 111 S. Ct. 23 (1990).

5. *Id.* at 394.

6. *Id.*

7. *See, e.g.*, Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599 (1987); Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447 (1987);

lowance of abduction at any price.[9] More recently, however, this general rule has come under close constitutional scrutiny and the *Toscanino* exception[10] is, perhaps, evidence of a trend to extend the protection of the Constitution, and the due process clause in particular, to extraterritorial abduction.

Like the abduction phase, and the traditional view that courts do not "inquire" into the constitutionality of the actual abduction itself, extradition has been similarly governed by a general rule of "non-inquiry." Traditionally, U.S. courts have refused to look into the protections provided the proposed extraditee in the requesting nation's criminal justice system. Again, like the effect of *United States v. Toscanino* on the abduction phase, a body of law has developed in the extradition arena to temper any injustices and inequities in the general rule. This Note will focus on the safeguards already available to the potential extraditee, and will attempt to shed some light on those obstacles in the extradition phase that hinder, albeit in the preservation of justice, a full-scale, "unlimited" war on terrorism.

First, the role of the executive and judicial branches in extradition will be addressed to determine if the courts may intervene in this foreign relations matter, an area usually reserved exclusively for the executive branch. Second, the continued viability of the general duty of non-inquiry by the extraditing nation will be established through an analysis of fundamental international principles of cooperation and comity. The exploration of such a perspective will illustrate the limited reach of the Constitution to foreign sovereigns. Next, the presentation of constitutional exceptions to the duty of non-inquiry will be accompanied by the more specific "specialty" and "double criminality" exceptions. The political offense exception, a doctrine of great complexity of which much has been written, will also be briefly addressed to show its force in denying extradition. Finally, the boundaries for extraditing the international terrorist will prove somewhat more expansive when the rights available in criminal proceedings are distinguished from those available in extradition proceedings. The Note will conclude with the determination that the constitutional and procedural protections for the alleged international terrorist are not so "limited" as to offend traditional and constitutional notions of justice and fundamental fairness, nor so "great" as to prevent a successful war on terrorism from being waged.

II. THE ROLE OF THE JUDICIARY AND EXECUTIVE IN EXTRADITION

A. *The Executive Branch*

It is well settled that, as a general rule, the conditions under which a fugitive is to be extradited to a foreign nation are to be determined by the "non-

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Quigley, *Government Vigilantes at Large: The Danger of Human Rights From Kidnapping of Suspected Terrorists*, 10 HUM. RTS. Q. 193 (1988).

8. *I.e.*, Ker v. Illinois, 119 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519 (1952).

9. "[T]he power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of 'forcible abduction.'" *Frisbie*, 342 U.S. at 522. The courts have the power to try the abducted individual "regardless of how presence was procured." *Id.* at 520.

10. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (No longer is due process limited to the guarantee of fair procedure at trial; now convictions may not be brought about by methods that offend a sense of justice).

judicial branches of the Government."[11] The legislature commonly confers this responsibility to the executive through treaty or act of Congress.[12] Currently, besides numerous extradition treaties with foreign nations, 18 U.S.C. §§ 3184 and 3186 give the executive branch, and the Secretary of State acting as agent of the executive branch, supervisory power over extradition proceedings.[13] This power is most likely vested in the executive branch for the simple reason that the State Department has access to better information and resources than does the judiciary. In particular, since the State Department has been charged with undertaking annual reviews of global human rights conditions under the Foreign Assistance Act of 1961,[14] it is assumed to be more sensitive to the hardships that may face extraditees once shipped abroad.[15]

B. *The Courts*

Despite legislative deference to the executive branch in extradition proceedings, the courts of this country have the authority to ensure that the executive does not exercise this power in a manner that violates "individual constitutional rights."[16] The courts should be prepared to take affirmative action in those instances when the executive has overlooked the rights of the accused in its haste to accomplish some other pressing policy matter.[17] The constitutional authority for such judicial intervention is addressed in the *Ahmad* opinion:

> [T]he courts are not, and cannot be, a rubber stamp for the other branches of government in the exercise of extradition jurisdiction. They must, under article III of the Constitution, exercise their independent judgment in a case or controversy to determine the propriety of an individual's extradition. The executive may not foreclose the courts from exercising their responsibility to protect the integrity of the judicial process.[18]

The scope of the courts' authority to intervene in extradition matters, however, is not clearly defined. Under the traditional rule of non-inquiry,[19] potential due process deficiencies in the requesting country would fall within "the exclu-

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11. Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960).

12. Williams v. Rogers, 449 F.2d 513, 520-21 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972). *See also* Argento v. Horn, 241 F.2d 258 (6th Cir.), *cert. denied*, 355 U.S. 818 (1957); Valentine v. United States, 299 U.S. 5 (1936).

13. *See* Berenguer v. Vance, 473 F. Supp. 1195, 1199 (D.D.C. 1979) (The very fact that extradition is accomplished under treaty indicates that it is most properly considered to be part of the foreign affairs responsibility of the President.), Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) ("Extradition is an act of the Executive Branch").

14. 22 U.S.C. §§ 2151-2414 (1990).

15. Ahmad v. Wigen, 726 F. Supp. 389, 415 (E.D.N.Y., 1989).

16. Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983). *See also* Charlton v. Kelly, 229 U.S. 447, 453-54 (1913) ("the constitutional limitation of due process of law prevents the exercise by the executive of the arbitrary discretion so as to deport the citizen").

17. The procedural device by which the courts block an executive mandated extradition is a writ of habeas corpus, discussed more fully in Part V.

There is some support for the proposition that in the extradition phase an active judiciary is necessary because the State Department does a poor job in screening requests for fairness. *See* Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1484-89 (1988).

18. *Ahmad*, 726 F. Supp. at 412.

19. *See supra* text following note 10.

sive purview of the executive branch" and courts would defer to the judgment of the executive branch.[20] Moreover, as a general rule today, the courts should still rely on the State Department's initial forwarding of the extradition request to the appropriate U.S. Attorney as assurance that the requesting country may be relied upon to treat the proposed extraditee fairly and in a manner not inconsistent with general constitutional safeguards.[21]

III. THE CUSTOM OF NON-INQUIRY

A. *Cooperation and Comity*

Writing for the majority in *Neely v. Henkel*,[22] Justice Harlan embraced the traditional view[23] of non-inquiry through an illustration of its adverse impact on those accused of crimes abroad: "When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people."[24]

Although the duty of non-inquiry is not applied as dogmatically today as it was in *Neely v. Henkel*,[25] universally accepted principles of cooperation and comity point to its continued vitality in today's world. Because no corner of the globe is immune from terrorist activities, it is in the best interest of all nations to facilitate the prosecution of these international terrorists by opening extradition channels despite the ever-present ideological differences which frequently hinder extradition proceedings.[26] To effectively extradite the international terrorist, many believe that the courts must play a limited role in scrutinizing the receiving country's judicial system, for "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity upon which extradition is based."[27]

Besides the opening of extradition channels, the Seventh Circuit in the case of *In re Assarsson*,[28] a recent extradition case, presented a more obvious reason for increased judicial deference to unfamilar systems abroad:

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20. Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980).

21. *Ahmad*, 726 F. Supp. at 415. Limitations on the applicability of U.S. constitutional protections abroad will be developed throughout the Note.

22. 180 U.S. 109 (1901).

23. Despite general approval, this "traditional" view has only been around since the mid-nineteenth century when courts first acquired a role in extradition.

24. *Neely*, 180 U.S. at 123.

25. Fifty years later, however, in Wilson v. Girard, 354 U.S. 524 (1957), the Supreme Court in its decision to turn over a U.S. soldier to Japan for prosecution, gave no consideration to the procedures that would prevail in the Japanese courts.

26. The UN General Assembly recognized the need for cooperation among its members in order to fight terrorism through, *inter alia*, extradition. G.A. Res. 61, 40 U.N. GAOR Supp. (No. 53), U.N. Doc. A/40/53, at 301 (1985).

27. Jhirad v. Ferrandina, 536 F.2d 478, 485 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976). *See also* Matter of Assarsson, 635 F.2d 1237, 1244 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981) ("While our courts should guarantee that all persons on our soil receive due process under our laws, that power does not extend to overseeing the criminal justice system of other countries.").

28. *Assarsson*, 635 F.2d 1237.

> We [the U.S.] often have difficulty discerning the laws of neighboring States, which operate in the same legal system as we do; the chance of error is much greater when we try to construe the law of a country whose legal system is much different from our own. The possibility of error warns us to be even more cautious of expanding judicial power over extradition matters.[29]

Whatever the rationale, be it principles of comity or the unfamiliarity of foreign systems, the United States must act prudently and subtly whenever inquiring into the legitimacy of a foreign legal system.

B. *The Limited Reach of the Constitution Abroad*[30]

The question of judicial intervention in extradition proceedings is clearly one of degree. It is firmly established that in order to go forward with extradition, the receiving nation's judicial system need not afford the accused the same constitutional safeguards available to those accused in the United States.[31] Mere judicial idiosyncracies abroad should not impede extradition proceedings. For example, in *U.S. Bloomfield v. Gengler*,[32] an attempt by the petitioner to prevent his extradition proved unsuccessful when he asserted that he would be subject to unconstitutional treatment if shipped to Canada where the law "still permits appeals by the prosecution from adverse rulings of law with, the further fillip that the appellate court may enter a conviction in a proper case."[33] Also illustrative of this principle is the argument that the provisions of the fifth amendment (that no person shall be held to answer a capital or otherwise infamous crime without a grand jury indictment) and the sixth amendment (requiring the accused to be confronted with witnesses against him) "appl[y] to criminal prosecutions tried here, and not to persons extradicted [sic] for trial under treaties with foreign countries whose laws may be entirely different."[34]

Nevertheless, even with the accused unable to prevent extradition on grounds that the receiving nation's judicial system fails to comport with the letter of our Constitution, the Fourth Circuit sardonically argues that "[i]t is unlikely that extradition would be ordered if . . . the foreign country regularly opened each day's proceedings with a hundred lashes applied to the back of each prisoner who did not deny his or her God or conducted routine breakings on the wheel for every prisoner."[35] Thus, as a general rule, extradition need only

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29. *Id.* at 1244.

30. For an evaluation of the constitutional safeguards available to the accused in the extradition proceeding itself, *see infra* Part V (c).

31. *See* PROPOSED EXTRADITION ACT OF 1984, H.R. REP. No. 998, 98th Cong., 2d Sess. 61-62 (1984) ("Not all of the guarantees of American due process must exist in exactly the same form."); Gallina v. Fraser, 278 F.2d 77, 78 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960) (foreign proceedings need not conform to American concepts of due process); Rosado v. Civiletti, 621 F.2d 1179, 1195 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980) ("[T]he relator cannot prevent his extradition simply by alleging that the criminal process he will receive fails to accord with constitutional guarantees.").

32. 507 F.2d 925 (2d Cir. 1974).

33. *Id.* at 929. For a more detailed look at similar differences in judicial systems which may or may not block extradition see the distinction of criminal from extradition proceedings in Part V.

34. *Ex parte* La Mantia, 206 F. 330, 332 (S.D.N.Y. 1913).

35. Prushinowski v. Samples, 734 F.2d 1016, 1019 (4th Cir. 1984).

follow a simple assurance of "a fair and impartial trial"[36] abroad, not an assurance that all of the procedural safeguards of an American trial will be available.

IV. Expanding Protections to the Proposed Extraditee: Exceptions to the General Rule of Non-Inquiry

A. *Prevention of Extradition to Countries where Fundamental Constitutional Safeguards are Ignored*[37]

Despite the fact that both the Constitution and treaties are considered the "supreme law of the land" in article VI section 2 of the Constitution, it is fundamental that when in direct conflict, a treaty must yield to the Constitution.[38] Extradition treaties are no exception. It has already been stated that the courts of this country will protect those individual liberties embodied in the Constitution.[39] It must be emphasized that they will do so even in the face of a valid extradition treaty (executed in good faith by the other branches of government) which tends to authorize contrary behavior.

One way to avoid the conflict is to "interpret" the extradition treaty in a manner consistent with the Constitution,[40] a process labeled in some legal circles as "judicial braking."[41] Another way to circumvent the conflict is to note changes that have occurred subsequent to the extradition treaty, knowledge of which, it may be argued, would have prevented an initial agreement between the two countries in the first place. This attack, however, would most likely need to be a brainchild of the executive branch. The *Restatement (Third) of Foreign Relations Law* [hereinafter *Restatement*] sets forth that it is in fact the Secretary of State, an agent of the executive, who may refuse to extradite when con-

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36. Neely v. Henkel, 180 U.S. 109, 123 (1901). *See also* Holmes v. Laird, 459 F.2d 1211, 1215-17 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972).

37. See Part V for a discussion of the constitutionality of extradition proceedings.

38. *See* Reid v. Covert, 354 U.S. 1, 16 (1957) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

39. *See, e.g.*, Barr v. United States Dept. of Justice, 819 F.2d 25, 27 (2d Cir. 1987); Ahmad v. Wigen, 726 F. Supp. 389, 410 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990), *stay denied*, 111 S. Ct. 23 (1990) ("The theme that treaties and other international obligations should not inhibit fundamental individual rights policies of the United States is a powerful one."——DUE PROCESS: Another nation may not "use the courts of our country to obtain power over a fugitive intending to deny that person due process."), Matter of Extradition of Burt, 737 F.2d 1477, 1487 (7th Cir. 1984) (EQUAL PROTECTION: Extradition decisions are to be based "on diplomatic considerations without regard to such constitutionally impermissible factors as race, color, sex, national origin, religion, or political beliefs. . .").

40. *See* Grin v. Shine, 187 U.S. 181, 184 (1902) (extradition treaties should be faithfully "observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused"); *Ahmad*, 726 F. Supp. at 411 (citing L. Henkin, Foreign Affairs and the Constitution 255 (1972)):

> Treaty obligations will sometimes need to be read and interpreted by the courts of a nation in the context of the fundamental law of the nation that entered into them. In the United States that law includes those principles embodied in the due process clauses of the fifth and fourteenth amendments to the Constitution
> . . . .

41. *See, e.g.*, F. Strong, American Constitutional Law 35-36 (1950) (construing the letter of statute narrowly so as not to conflict with common law is another example of "judicial braking").

ditions "*change* after an extradition treaty is concluded, and, without formal denunciation or suspension of the treaty."[42]

The authority of a treaty relative to the Constitution is well settled, but it was not until 1960 that this distinction was made evident in the extradition arena. Prior to that point, the rule of non-inquiry had met with little opposition in judicial opinions. But in *Gallina v. Fraser*,[43] a case in which a petitioner claimed that if he was extradited to Italy he would not be granted, *inter alia*, a fair trial, the Second Circuit set down the exception to the general rule of non-inquiry that is still alive today: There can be "imagine[d] situations where the relator, upon extradition, would be subject to procedure or punishment so antipathetic to a federal court's sense of decency as to require re-examination of the principle [of non-inquiry]."[44] The decision in *Gallina*, requiring at least a cursory inquiry into the foreign system awaiting the extraditee, is not only consistent with the Constitution, but is analogous to firmly established common law doctrines such as the doctrine of "forum non conveniens" which requires the court to assure itself that the alternative forum is adequate to protect the rights of the party before implementing the doctrine.[45]

There is no formal agenda outlining the scope of judicial review of the foreign system awaiting the extraditee. Nonetheless, there has been some attempt by Congress to codify the necessary criteria for a fair trial abroad.[46] One of the more controversial criteria is the right of the accused to be present at trial.[47] The district court in *Gallina v. Fraser*[48] first adopted the extreme view that a conviction *in absentia* "is not contrary to due process of law even where it appears that the extradition will not be followed by a new trial, but rather by immediate incarceration."[49] More recently however, there has been support for the proposition that as a condition of surrender of the accused, "a person found guilty in absentia" must be retried.[50] The *Restatement* adopts a more pragmatic, middle-of-the-road view, propounding that a trial in absentia should be

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42. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 477 at 558 (1987) (emphasis added).

43. Gallina v. Fraser, 278 F.2d 77 (2d. Cir.), *cert. denied*, 364 U.S. 851 (1960).

44. *Id.* at 79.

45. Murty v. Aga Khan, 92 F.R.D. 478, 482 (E.D.N.Y. 1981).

46. *See* PROPOSED EXTRADITION ACT OF 1984, H.R. REP. No. 998 at 61 (citing Dept. of Defense Directive 5525.1 (Aug. 7, 1979)), in which the House established the following helpful criteria for determining whether the accused will be subject to a fair trial abroad:

1. No *ex post facto* law;
2. No bill of attainder;
3. Right to assistance of defense counsel;
4. Right to be present at trial;
5. Right to be confronted by hostile witnesses;
6. Right to a compulsory process to secure witnesses;
7. Burden of proof on the government;
8. Right to trial by an impartial tribunal;
9. Right to be free from self-incrimination;
10. Right to a public trial.

47. *Id.*

48. 177 F. Supp. 856 (D. Conn. 1959), *aff'd*, 278 F.2d 77, *cert. denied*, 364 U.S. 851 (1960).

49. *Id.* at 866.

50. *Ahmad*, 726 F. Supp. at 410 (citing Second Circuit opinion in *Gallina* which overturned the district court's liberal interpretation).

treated as a valid indictment as long as "the record of the proceedings of a trial *in absentia* discloses probable cause that the crime charged was committed by the accused."[51]

Because the *Gallina* exception to the rule of non-inquiry has yet to be invoked in its thirty-year existence, it appears obvious that not all constitutional infringements in foreign judicial systems warrant United States intervention. For example, the Fourth Circuit in *Prushinowski v. Samples*[52] refused to prevent extradition despite petitioner's claim that his constitutional right to religious expression would be violated by incarceration in British prisons which refused to cater to strict religious diets.[53] Moreover, the *Prushinowski* court found petitioner's claim that he would, consequently, starve to death, equally without merit.[54] Other claims of grossly unconstitutional behavior by the requesting nation have similarly proved futile when brought before the proper extradition tribunal.[55] The death penalty is the one punitive device which touches off most of the intervention/consent language in extradition treaties. Many treaties contain a clause that the death penalty will not be invoked without the consent of the requested nation.[56]

The *Soering Case*[57] not only serves as an example of a country refusing to extradite because of a potential death penalty sentence, but also offers a valuable lesson in the adverse consequences which may accompany excessive precaution in extradition. In *Soering*, the European Court of Human Rights found the character and machinery of the Virginia legal system beyond reproach, but refused to extradite the detainee to the United States because "the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty"[58] violates article 3 of the European Convention which mandates: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[59] It is ironic that the court found fault with the cruelty of the wait, yet found nothing wrong with the execution itself.

While the refusal to extradite in *Soering* may have been well founded, though the court in *Ahmad* argued to the contrary,[60] consistent refusals to extradite are bad for the international extradition system and severely impede the war on terrorism. Moreover, it would not be surprising to see those same countries, being denied extradition on constitutional or human rights grounds, recip-

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51. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 475 comment h at 562 (1987).

52. Prushinowski v. Samples, 734 F.2d 1016 (4th Cir. 1984).

53. *Id.* at 1019.

54. *Id.*

55. *See, e.g., Ahmad*, 726 F. Supp. at 419-20 (petitioner failed to demonstrate that if he was convicted in Israel, his prison service would be so harsh as to be inhumane, despite rumors of batteries, rapes and overcrowding).

56. *See, e.g.*, Convention on Extradition between the United States and Sweden, 1963, Art. VIII, 14 U.S.T. 1845, T.I.A.S. No. 5496, 494 U.N.T.S. 141; Art. IV of U.S. Extradition Treaty, 14 U.S.T. 1845.

57. Soering Case, 161 Eur. Ct. H.R. (ser. A)(1989).

58. *Id.* at 44.

59. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 224 (1955).

60. *See Ahmad*, 726 F. Supp. at 414 (arguing that the *Soering Case* may have gone too far in limiting extradition based upon probable conditions in the requesting country).

rocate by refusing to surrender suspected terrorists themselves. For this reason, judicial scrutiny of systems abroad should be handled in a diplomatic and prudent fashion so as to preserve fairness, while at the same time discouraging retaliation from abroad.

Once it has finally been determined that the accused is extraditable, and he is in fact extradited to foreign soil, there is still supporting authority which argues that the requested nation's role in the protection of the accused has yet to be exhausted. First, the State Department will assign an American representative to consult with the extraditee and to observe the prosecution of the case before, during, and after trial to ensure that "conditions,"[61] consistent with principles of fundamental fairness, are fulfilled.[62] However, despite having a legitimate stake in the fairness of the trial abroad, the United States cannot go so far as to guarantee "life" as well as liberty. It is the requesting country that has primary responsibility for protecting the frequently despised extradited terrorist from assassination.[63] Second, under many extradition treaties, a person extradited to one country may not be subsequently extradited to a third nation to stand trial for the same act without the consent of the original requested country.[64]

Finally, it should be pointed out that the number of conflicts involving the United States Constitution and extradition treaties to which the United States is a party would be significantly diminished if the United States only entered such treaties with nations possessing both an ideology and judicial system similar to its own. According to the *Restatement*, "Congress and the executive branch do not enter into extradition treaties with countries in whose criminal justice system they lack confidence."[65] As evidence of such a policy, the United States had no extradition treaty with the USSR, People's Republic of China, North Korea, South Korea, or Iran as of 1986.[66] In actuality, however, the growth of international terrorism and transnational crime has forced the United States to negotiate bilateral extradition treaties with some countries with ideologies and legal systems antithetical to those of the United States in order to secure the return of U.S. fugitives from abroad.[67]

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61. The State Department will set forth the "conditions" by which the accused is to be prosecuted and they must be agreed to by the requesting nation before an extradition order is authorized.

62. *Ahmad*, 726 F. Supp. at 410 and 419.

63. *See* Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 477 comment d at 580 (1986).

65. *Id.* at 558.

66. *Id.*

67. *See* PROPOSED EXTRADITION ACT OF 1984, H.R. REP. NO. 998, 98th Cong., 2d Sess. 62 (1984) for examples of some of these nations:

1. IRAQ: Iraqis are subject to arbitrary arrest on political or security grounds.
2. TURKEY: The government admitted that 15 persons in government custody had died as a result of torture.
3. EL SALVADOR: Torture by elements of the Salvadoran armed forces does occur, arrest without warrant is permitted, arresting officers are not required to identify themselves.
4. HAITI: Beatings, a traditional practice in Haitian jails, continued in 1982.
5. POLAND: U.S. entered treaty before reforms despite the wide powers of summary arrest and internment which allow security organ to detain and hold virtually incommunicado for indefinite periods of time anyone against whom they harbor suspicions.

B. *The Specialty Doctrine*

Besides fairness and constitutional impediments to extradition, there also exist several internationally accepted practices which serve as exceptions to the general rule of non-inquiry. Under the "specialty doctrine" the extradited party may not be tried for any crime other than that for which he was surrendered. For example, in *Gallina*,[68] Italy recognized "that extortion and infliction of serious bodily injuries are not extraditable crimes," therefore so much of the sentence as applied to those crimes could not be imposed on the relator by Italy.[69] As an exception to the specialty doctrine, the extradited party may be tried for a crime other than that for which he was surrendered if the asylum country consents.[70] The rationale for such an exception stems from the fact that specialty is merely a "privilege" allotted to the asylum state, and not an inalienable "right" of the accused.[71]

The varying ways a charge may be worded in a complaint appear to create some ambiguities as to the appropriateness of invoking the specialty doctrine to prevent extradition. The Sixth Circuit in *Demjanjuk v. Petrovsky*[72] clarified this problem by noting that "the principle of specialty does not impose any limitation on the particulars of the charge so long as it encompasses only the offense for which extradition was granted."[73] For example, the court determined that the petitioner's extradition charge of "murder" was equivalent to (1) crimes against the Jews, (2) crimes against humanity, and (3) war crimes (*i.e.*, killing Jews, civilians and civilians in occupied terrority are all included in the "murder" charge).[74]

Finally, it should be noted that the protection provided by the specialty doctrine does not extend to crimes committed subsequent to the accused's extradition.[75] Thus, specialty does not preclude prosecution for crimes committed in the requesting country after the extraditee has been surrendered there. However, if the extraditee is not charged with the crime for which he was originally

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Recent accounts would lead one to believe that the proliferation of U.S. extradition agreements throughout the world may only be accomplished by ignoring the plethora of human rights violations that still persist. *See, e.g.*, Wall Street J., Feb. 2, 1990, at A22:

> A report prepared for the current session of the United Nations Human Rights Commission lists 49 countries in Asia, Africa, the Middle East and Latin America with documented or alleged cases of torture . . . "Though the fight against torture has considerably intensified during the last decade, [torture] remains a common phenomenon in today's world."

See also, Wall St. J., Feb. 22, 1990, at A1, col. 3 ("The State Department criticized China, Nicaragua and Iraq for human-rights abuses. In an annual report to Congress, the department also documented beheadings in Saudi Arabia and floggings in Iran . . . .").

68. *See supra* note 11.

69. Gallina v. Fraser, 177 F. Supp. 856, 866 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960).

70. Berenguer v. Vance, 473 F. Supp. 1195, 1197 (D.D.C. 1979).

71. Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973). "As a matter of international law, the principle of specialty has been viewed as a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused." As a matter of international law, it necessarily follows that specialty is also a principle of U.S. law. The Paquete Habana, 175 U.S. 677 (1900).

72. 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

73. *Id.* at 583.

74. *Id.*

75. *See* Collins v. O'Neil, 214 U.S. 113 (1909); Collins v. Johnston, 237 U.S. 502 (1915).

extradited to the requesting nation, or if he was tried and was acquitted, the extraditee "shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime previous to his extradition."[76]

C. *The Double Criminality Doctrine*

Under the doctrine of double criminality, extradition does not go forward unless the acts charged constitute a serious crime punishable under the laws of both countries.[77] The general rule that the acts alleged be criminal in both jurisdictions is "central to extradition law."[78] In *Freedman v. United States*,[79] for example, extradition of the accused to Canada was denied because neither U.S. federal nor state laws recognized the crime of commercial bribery for which the suspect was sought.[80] In its opinion, the Georgia district court emphasized that the charge was not criminal according to the laws of the place where the accused was "found."[81]

Like the specialty doctrine, there are some exceptions to the doctrine of double criminality. In *Freedman*, although the court could invoke double criminality and deny extradition to Canada, the decision to surrender the accused may have been assigned to the court through the terms of the extradition treaty itself, thus leaving the extradition decision to the court's discretion.[82] Furthermore, the Sixth Circuit similarly has held that the mere fact that "the specific offense charged is not a crime in the United States does not necessarily rule out extradition."[83]

Questions of semantics in distinguishing dissimilar classifications of the same crime have commonly been resolved pragmatically. Additionally, there is some support for the proposition that the alleged offenses need not be the same crime, but need only be criminal. The Second Circuit adopted this rule in *United States v. Stockinger*,[84] finding that it was "immaterial that the acts in question constitute the crime of theft and fraud in Canada and the crime of larceny in New York State. It is enough if the particular acts charged are criminal in both jurisdictions."[85] It is also argued that double criminality does not prevent extradition if "defenses may be available in the requested state that would not be available in the requesting state, or that different requirements of proof are applicable in the two states."[86] Stretching the doctrine of double crim-

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76. United States v. Rauscher, 119 U.S. 407, 424 (1886).

77. *See* Wright v. Henkel, 190 U.S. 40 (1903); Collins v. Loisel, 259 U.S. 309, 311 (1922); Brauch v. Raiche, 618 F.2d 843, 847 (1st Cir. 1980).

78. *Brauch*, 618 F.2d at 847. *See also* Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) ("There is a requirement of 'double criminality' in international extradition cases").

79. 437 F. Supp. 1252 (N.D. Ga. 1977).

80. *Id.* at 1261, 1262.

81. *Id.* at 1262.

82. *See* Factor v. Laubenheimer, 290 U.S. 276, 300 (1933); *Gallina*, 278 F.2d at 79 ("[I]f the extradition treaty so provides, the U.S. may surrender a fugitive to be prosecuted for acts which are not crimes within the U.S.").

83. *Demjanjuk*, 776 F.2d at 581.

84. 269 F.2d 681 (2d Cir.), *cert. denied*, 361 U.S. 913 (1959).

85. *Id.* at 687.

86. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 476 comment d at 569 (1986).

inality even further, the *Demjanjuk*[87] court embraced a "universality principle," allowing a nation to punish certain offenses recognized by the community of nations as of universal concern, and argued that "some crimes are so universally condemned that the perpetrators are the enemies of all people . . . [t]herefore any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses."[88] Demjanjuk was an alleged Nazi war criminal, and Israel sought his extradition from the United States in order to prosecute him under a criminal law authorizing punishment of Nazis.[89] The court allowed extradition even though (1) Demjanjuk was charged with committing these acts in Poland and not Israel; and (2) the state of Israel was not even in existence at the time Demjanjuk allegedly committed the offenses.[90]

D. *The Political Offenses Exception*

Individuals who commit acts of a "political" nature (*i.e.*, in defiance or attempted overthrow of an existing regime) are generally excepted from extradition. The United States' adoption of the political offenses exception is evidenced by its support for the UN Protocol Relating to the Status of Refugees[91] which "denies extradition in cases in which it is demonstrated that a fugitive's life or freedom would be threatened on account of his political opinion."[92] A sufficient exploration of this dynamic doctrine of international law is outside the scope of this Note.[93] Generally though, an act is deemed "political" for the purposes of the exception when: (1) there is a violent political disturbance in the requesting country *and* (2) the act charged was incidental to this disturbance.[94] For the purposes of this Note, it is important to realize that the exception was never intended to protect acts of "international terrorism"[95] or political "acts of destruction whose nature and scope . . . [exceed] human imagination."[96]

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87. *Demjanjuk*, 776 F.2d at 571.

88. *Id.* at 582.

89. *Id.*

90. *Id.*

91. 19 U.S.T. 6223, T.I.A.S. 6577.

92. Nicosia v. Wall, 442 F.2d 1005, 1006 (5th Cir. 1971).

93. For a more expansive look at the political offenses exception *see, e.g.*, Banoff & Pyle, *To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U. J. INT'L L. & POL'Y 169 (1984); Bouffard, *Extradition—Political Offense Exception—United States Court Creates New Definition for Use Against International Terrorists*, 6 SUFFOLK TRANSNAT'L L.J. 147 (1982); Bury, *The Political Offense Exception in United States Extradition Law*, 8 BROOKLYN J. INT'L L. 429 (1982); Clark, *Political Offenses in Extradition: Time for Judicial Abstention*, 5 HASTINGS INT'L & COMP. L. REV. 131 (1981); Gilbert, *Terrorism and the Political Offense Exemption Reappraised*, 34 INT'L & COMP. L.Q. 493 (1985); Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381 (1980); Malik, *Unraveling the Gordian Knot: The United States Law of International Extradition and the Political Offender Exception*, 3 FORDHAM INT'L L.F. 141 (1980); Matsouka, *Extradition Law: Applicability of the Political Offense Exception*, 23 HARV. INT'L L.J. 124 (1982); Sternberg & Skelding, *State Department Determinations of Political Offenses: Death Knell for the Political Exception in Extradition Law*, 15 CASE W. RES. J. INT'L L. 137 (1983).

94. Eain v. Wilkes, 641 F.2d 504, 516 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). *See also* Wilson v. Girard, 354 U.S. 524 (1953) (U.S. soldier was not protected by political offenses exception, and was consequently extradited because he was acting outside the scope of official military duty).

95. *See* Quinn v. Robinson, 783 F.2d 776, 806 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

96. *Id.* at 801.

V. LIMITING PROTECTIONS TO THE PROPOSED EXTRADITEE: DISTINGUISHING CRIMINAL PROCEEDINGS FROM EXTRADITION PROCEEDINGS

A. *Habeas Corpus Review*

The proper avenue for an objection to a proposed extradition is habeas corpus review. Under 28 U.S.C. § 2241(c)(3), the habeas corpus petition is deemed the appropriate device for review of the 18 U.S.C. § 3184 hearing and the adjudication of the claim that the U.S. government's act of extraditing a given individual is unconstitutional.[97] If the court finds in favor of petitioner's constitutional deprivation claim, then a writ of habeas corpus, staying extradition, is in order. Despite the blanket statement by the *Ahmad* court that before actual extradition, the accused is entitled to an evidentiary hearing to "determine the nature of treatment probably awaiting petitioner in the requesting nation [and] to determine whether he or she can demonstrate probable exposure to such treatment as would violate universally accepted principles of human rights,"[98] the extradition statute explicitly reads that "[t]he writ of habeas corpus shall not extend to a prisoner unless [h]e is in custody in violation of the Constitution."[99] Thus, claims that do not raise constitutional issues do not trigger habeas corpus review and, consequently, are of no assistance to the accused who is seeking to stay his extradition.

B. *Burden of Proof*

Despite the availability of extradition proceedings and, perhaps, habeas corpus review, the proposed extraditee still must overcome numerous obstacles heavily favoring cooperation with the requesting nation. The burden of proof is on the petitioner to show that there is a "substantial probability that he or she can rebut the presumption of State Department propriety in assuming the fairness of the judicial process in the requesting country."[100] Because a finding of probability of abuse overrides the language of the extradition treaty, and the United States faces the possibility that it may be envisioned as in breach of a prior agreement, the petitioner is required "to demonstrate by 'clear and convincing' evidence that upon extradition he or she will face a lack of due process, or torture or other cruel or inhuman treatment in the requesting country."[101] Finally, extradition will be denied if, after the evidentiary hearing, the court is satisfied that it is "more probable than not" that the foreign country will treat the accused unfairly.[102]

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97. *See* Sayne v. Shipley, 418 F.2d 679 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970); Plaster v. United States, 720 F.2d 340, 349 (4th Cir. 1983); David v. Attorney General, 699 F.2d 411, 415 (7th Cir. 1983), *cert. denied*, 464 U.S. 832 (1983); Matter of Burt, 737 F.2d 1477, 1482 (7th Cir. 1984).

98. *Ahmad*, 726 F. Supp. 389, 410, *aff'd*, 910 F.2d 1063 (2d Cir. 1990), *stay denied*, 111 S. Ct. 23 (1990).

99. 28 U.S.C. § 2241(c)(3) (1977).

100. *Ahmad*, 726 F. Supp. at 415 (citing FED. R. EVID. 301).

101. *Id.* at 416.

102. *Id.*

C. *Limited Availability of Constitutional Rights and Defenses*

When immersed in a habeas corpus review, the federal courts do not only assess the substantive constitutionality of the requesting nation's judicial system,[103] but they also have the authority to consider constitutional defects with the extradition "procedure" itself.

Just as the trial abroad need not comport exactly with U.S. constitutional guidelines, the extradition proceeding also does not need to provide the accused with all the constitutional safeguards available to defendants in purely domestic criminal trials. First, the fifth and sixth amendment right to a speedy trial has been held not to be "an appropriate consideration" for extradition proceedings[104] and should be "limited by its terms to criminal prosecutions."[105] Second, besides the absence of a right to a speedy trial, "it is well established that in the absence of a treaty provision, the statute of limitations may not be raised as a defense to extradition proceedings."[106] The Seventh Circuit explained why the duty of the government to prosecute swiftly does not require it to also extradite swiftly:

> To constrain the government by placing on it the duty to undertake its extradition decisions with an eye not only towards the legitimate international interest of the United States . . ., but also toward the prejudice that might result to an individual accused because of the amount of time that has elapsed, would be to distort the aims of the diplomatic effort.[107]

Additionally, although the *Restatement* provides that there is to be no extradition "if prosecution in the requesting state would be, or was, in contravention of an applicable principle of double jeopardy,"[108] the Second and Ninth Circuits have acknowledged that the application of "res judicata" is inappropriate and the only limitation on the number of extradition requests is that each such request must be based on a good faith determination that extradition is warranted.[109]

D. *Limited Availability of Criminal Rights and Defenses*

There was at one time support for the general proposition that those facing extradition procedures were entitled to the same rights and "defences as others accused of crime within our own jurisdiction."[110] It is widely accepted today, however, for the simple reason that the extradition proceeding is not a trial of guilt or innocence, that extradition and criminal proceedings are inherently dif-

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103. For an analysis of the applicability of constitutional safeguards to the requesting nation, *see supra* Part IV (a).

104. *Freedman*, 437 F. Supp. at 1265.

105. Jhirad v. Ferradina, 536 F.2d 478, 485 n.9 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976).

106. *Freedman*, 437 F. Supp. at 1263.

107. *Burt*, 737 F.2d at 1487.

108. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 476(1)(b) at 566 (1986).

109. *See* United States v. Doherty, 786 F.2d 491, 501-02 (2d Cir. 1986); Hooker v. Klein, 573 F.2d 1360, 1366 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978).

110. Grin v. Shine, 187 U.S. 181, 184 (1902).

ferent.[111] In enforcing an extradition treaty, "the ordinary technicalities of criminal proceedings are applicable only to a limited extent"[112] and "form is not to be insisted on beyond the requirement of safety and justice."[113] Consequently, the requesting nation is given an advantage over the party seeking to block extradition; an advantage "most uncommon to ordinary civil and criminal litigation."[114]

The first advantage to the requesting nation is that the accused has no right to contradict the requesting country's proof or pose questions of credibility as in an ordinary trial, but only to offer evidence which explains or clarifies the proof.[115] In light of the absence of a uniform rule of evidence,[116] the defenses of the accused are extremely limited and he may not, for example, introduce evidence to establish alibi or insanity.[117] Another requirement that assists the requesting nation is that 18 U.S.C. § 3190 permits the requesting country to introduce evidence gathered ex parte in the requesting country, while those same ex parte opportunities of section 3190 are unavailable to the accused.[118] Additionally, the complaint need not set forth the crime for which the fugitive was indicted abroad with any particularity,[119] and an authentic copy of the warrant for arrest is unnecessary.[120] Along those same lines, "the actual guilt of the fugitive does not have to be established, but instead the demanding country need show only probable cause that he is guilty."[121] Finally, the United States may refuse to withhold extradition for procedural deficiencies if the requesting nation has sufficient safeguards in place.[122]

VI. CONCLUSION

As this Note has demonstrated, the constitutional and procedural protections for the alleged international terrorist who seeks to prohibit extradition from abroad have evolved in a manner sympathetic to the right of all individuals to be afforded fundamental constitutional protections, yet without becoming overly stringent so as to prevent a successful war on terrorism from being waged. International cooperation in the extradition arena, accompanied by a general duty of non-inquiry, will assist in preventing the obstruction of extradition channels. Moreover, the absence of rigid adherence to constitutional and

111. *See* Jimenez v. Aristeguieta, 311 F.2d 547, 556 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); *Shapiro*, 478 F.2d at 900.

112. *Grin*, 187 U.S. at 184.

113. Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

114. First Nat'l City Bank of N.Y. v. Aristeguieta, 287 F.2d 219, 226 (2d Cir. 1960), *vacated as moot*, 375 U.S. 49 (1963).

115. *Shapiro*, 478 F.2d at 905.

116. Charlton v. Kelly, 229 U.S. 447, 461 (1913).

117. *First Nat'l City Bank of N.Y.*, 287 F.2d at 226-27.

118. *Id.* at 226.

119. *Grin*, 187 U.S. at 188-89.

120. *Id.* at 190.

121. *First Nat'l City Bank of N.Y.*, 287 F.2d at 227.

122. *See, e.g.*, Magisano v. Locke, 545 F.2d 1228, 1230 (9th Cir. 1976) (Circuit court found no need to protect accused against illegally obtained evidence because "the Canadian statute prohibiting evidence acquired by illegal wiretapping is essentially the same as that of the U.S.").

criminal safeguards in the extradition proceeding itself has further facilitated the use of extradition as an effective weapon in the war on terrorism. To ensure such a war is waged within the parameters of the Constitution, exceptions to the general rule of non-inquiry (*i.e.*, the *Gallina* exception, the double criminality and specialty doctrines, and the political offense exception) may be invoked to remedy any deficiencies in justice and fairness.

Skeptics of the safeguards provided the alleged international terrorist prior to extradition may still find it wholly inappropriate that the same assassin who has callously destroyed the lives of innocent citizens through random bombings and gunfire, now is cloaked with such constitutional amenities. Despite these concerns, it is important to view realistically the constitutional and procedural impediments to extradition. These safeguards protect the country as a whole from government usurpations of individual liberties, yet keep the extradition avenues relatively open. Those further concerned with the inability of the courts to operate as an effective agent in the war on terrorism should keep in mind the persistent ambiguities of international law which allow for some judicial discretion in dealing with those heinous terrorists brought before the bench. These skeptics may take solace in reasoning such as that offerred by the judge in *Linnas v. INS*,[123] a deportation case which provides a poignant illustration of the attitude of many judges when dealing with terrorists already indicted abroad:

> The foundation of [the proposed deportation candidate's] due process argument is an appeal to the court's sense of decency and compassion. Noble words such as "decency" and "compassion" ring hollow when spoken by a man who ordered the extermination of innocent men, women and children kneeling at the edge of a mass grave. [Petitioner's] appeal to humanity, a humanity which he has grossly, callously and monstrously offended, truly offends this court's sense of decency.[124]

Kent Wellington

123. 790 F.2d 1024 (2d Cir.), *cert. denied*, 479 U.S. 995 (1986).
124. *Id.* at 1032.